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**HSBC Malaysia Bhd v
Lionel Rao a/l R Simon Rao & Anor**

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HIGH COURT (KUALA LUMPUR) — SUIT NO S7-24-2521 OF 2003
NOOR AZIAN SHAARI JC
7 MARCH 2006

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Civil Procedure — Affidavit — Filing and serve — Filing further affidavits — Whether further affidavits can be filed when hearing date fixed and written submission filed by both parties

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Civil Procedure — Originating summons — Procedure by — Notice to hear the originating summons — Whether notice to hear the originating summons not being properly served renders the proceedings a nullity

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By this originating summons filed under O 83 of the Rules of the High Court 1980 ('RHC'), the plaintiff is seeking for an order of foreclosure in respect of a property charged by the defendants to the plaintiff. After both parties filing their respective affidavits, the court on a mention date directed the parties to submit their written submission before the fixed hearing date on 27 January 2006 at 3pm. The hearing date was fixed in the presence of a chambering student representing the plaintiff.

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On 26 January 2006, counsel for the plaintiff telephoned and spoke to the court interpreter asking for the postponement of the hearing as the plaintiff wanted to file a further affidavit. The Deputy Registrar informed the counsel that the application for postponement was not allowed and the case would go on for hearing as scheduled and the counsel was also informed that the court would not allow further affidavit to be filed since the case was already fixed for hearing. On the day of hearing at about

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2.45pm, the plaintiff filed a summons in chambers and two affidavits. The summons in chambers was an application under O 14 r 4 RHC, ie to use plaintiff's affidavit that was filed on the same day in support of the application in the originating summons. At the hearing on 27 January 2006 at 3pm, the plaintiff's counsel still insisted on a postponement of the hearing of the originating summons for three

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reasons: (1) that the summon in chambers filed on the same day should be heard first; (2) the notice of appointment for the hearing of the originating summons issued under O 83 r 2 of the RHC in respect of the second defendant that had been filed had not been returned by the court registry to enable the counsel for the plaintiff to effect service on the second defendant; and (3) the court could not make two orders for sale separately against both defendants.

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Held, dismissing the plaintiff's application to file further affidavit with cost:

- (1) When the date of hearing was fixed, the chambering student representing the

plaintiff agreed to it and since the written submissions had already been filed by both parties, 'the evidence of affidavits is deemed closed' and therefore there should be no more filing of affidavit evidence (see para 8).

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- (2) Notice to hear the originating summons must be properly served, otherwise the proceedings or order made will be a nullity and mainly on the belief that the notice of appointment in respect of the second defendant had not been extracted and the hearing was postponed (see paras 5 & 12).

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[Bahasa Malaysia summary]

Melalui saman pemula ini di bawah A 83 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), plaintiff memohon satu perintah perampasan berkaitan sebidang hartanah yang digadaikan oleh defendan-defendan kepada plaintiff. Setelah kedua-dua pihak memfailkan affidavit masing-masing, mahkamah pada tarikh sebutan telah mengarahkan pihak-pihak mengemukakan hujah bertulis mereka sebelum tarikh perbicaraan yang ditetapkan pada 27 Januari 2006 pada pukul 3 petang. Tarikh perbicaraan itu telah ditetapkan dengan kehadiran penuntut dalam kamar yang mewakili plaintiff. Pada 26 Januari 2006, peguam bagi pihak plaintiff telah menelefon dan bercakap dengan jurubahasa mahkamah bertanyakan untuk satu penangguhan perbicaraan tersebut kerana plaintiff ingin memfailkan affidavit seterusnya. Timbalan Pendaftar memaklumkan peguam bahawa permohonan untuk penangguhan itu tidak dibenarkan dan kes itu akan didengar seperti yang dijadualkan dan peguam juga dimaklumkan bahawa mahkamah tidak membenarkan affidavit seterusnya difailkan memandangkan kes tersebut telahpun ditetapkan untuk perbicaraan. Pada hari perbicaraan lebih kurang pukul 2.45pm, plaintiff telah memfailkan satu saman dalam kamar dan dua affidavit. Saman dalam kamar itu adalah satu permohonan di bawah A 14 k 4 KMT, iaitu untuk menggunakan affidavit plaintiff yang telah difailkan pada hari yang sama untuk menyokong permohonan dalam saman pemula itu. Semasa perbicaraan pada 27 Januari 2006 pada pukul 3 petang, peguam bagi pihak plaintiff masih inginkan satu penangguhan untuk perbicaraan saman pemula itu kerana tiga sebab: (1) bahawa saman dalam kamar yang difailkan pada hari yang sama patut didengar dahulu; (2) notis pelantikan untuk perbicaraan saman pemula yang dikeluarkan di bawah A 83 k 2 KMT berkaitan defendan kedua yang telah difailkan tidak dikembalikan kepada pendaftar mahkamah untuk memastikan peguam bagi pihak plaintiff melaksanakan penyampaian ke atas defendan kedua; dan (3) mahkamah tidak boleh membuat dua perintah jualan secara berasingan terhadap kedua-dua defendan.

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Diputuskan, menolak permohonan plaintiff untuk memfailkan affidavit seterusnya dengan kos:

- (1) Apabila tarikh perbicaraan telah ditetapkan, penuntut dalam kamar yang mewakili plaintiff bersetuju kepadanya dan memandangkan hujah bertulis telahpun difailkan oleh kedua-dua pihak, 'the evidence of affidavits is deemed closed' dan oleh itu tidak boleh ada pemfailan keterangan affidavit (lihat perenggan 8).

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- A** (2) Notis mendengar saman pemula itu hendaklah disampaikan dengan betul, jika tidak prosiding atau perintah yang dibuat adalah tidak sah dan terutamanya atas kepercayaan bahawa notis pelantikan berkaitan defendan kedua tidak dikeluarkan perbicaraan itu ditangguhkan (lihat perenggan 5 & 12).]

B Notes

For cases on filing further affidavits, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 400–401.

- C** For cases on procedure by originating summons, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 4363–4367.

Cases referred to

Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd [2003] 4 MLJ 409 (folld)

- D** *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd* [1996] 1 MLJ 374 (folld)

Legislation referred to

Rules of High Court 1980 O 41 r 4, O 83 r 2

- E** *Anis Idura Hashim (Shearn Delamore & Co) for the plaintiff.*
Alvin Julian (Paul Chong & Nathan) for the defendant.

Noor Azian Shaari JC:

- F** [1] By this originating summons filed under O 83 of the Rules of the High Court 1980, HSBC Malaysia Bhd, the plaintiff is seeking for an order of foreclosure in respect of a property charged by Lionel Rao a/l R Simon Rao and Cheh Gek Moi, the defendants to plaintiff.

- G** [2] In order to be able to visualize clearly the issues leading to the appeal by the plaintiff in respect of my decision on the 27 January 2006, it is best that I append below the sequence of events that took place before that date:

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|----------|-----|-------------|---|--|
| H | (1) | 30 Dec 2003 | — | the plaintiff filed the originating summons (Enclosure 1) |
| | (2) | 30 Jan 2004 | — | the plaintiff filed its supporting affidavit in respect of the originating summons (Enclosure 2) |
| | (3) | 10 Nov 2004 | — | the plaintiff filed a further affidavit affirmed on 10 November 2004 (Enclosure 7) |
| I | (4) | 27 Jan 2005 | — | the plaintiff filed a further affidavit affirmed on 19 January 2005 (Enclosure 10) |
| | (5) | 8 Mar 2005 | — | the first defendant filed his affidavit in reply affirmed on 7 March 2005 (Enclosure 15) |
| | (6) | 9 Mar 2005 | — | the plaintiff filed a further affidavit affirmed on 2 March 2003 (Enclosure 16) |

(7)	21 Mar 2005	—	the first defendant filed a second affidavit in reply affirmed on 17 March 2005 (Enclosure 17)	A
(8)	15 Apr 2005	—	the plaintiff filed another affidavit affirmed on 15 April 2005 (Enclosure 18)	
(9)	27 Apr 2005	—	the first defendant filed his third affidavit affirmed on 20 April 2005 (Enclosure 19)	B
(10)	23 May 2005	—	the plaintiff filed its further affidavit in reply affirmed on 25 May 2005 (Enclosure 20)	
(11)	1 June 2005	—	The first defendant filed his fourth affidavit in reply affirmed on 31 May 2005 (Enclosure 21)	
(12)	20 June 2005	—	the plaintiff filed its third affidavit in reply affirmed on 20 June 2005 (Enclosure 22)	C
(13)	10 Nov 2005	—	The case was mentioned before me and parties were directed to prepare and submit written submissions before the hearing date was fixed, ie 27 January 2006 at 3pm.	
(14)	26 Jan 2006	—	Counsel for the plaintiff (Cik Anis Hashim) telephoned and spoke to the court interpreter asking for the postponement of the hearing on 27 January 2006 as the plaintiff wanted to file further affidavit. The Timbalan Pendaftar informed the counsel that the application for postponement was not allowed and the case would go on for hearing as scheduled on 27 January 2006. Counsel was also informed that the court would not allow further affidavit to be filed since the case was already fixed for hearing.	D
(15)	27 Jan 2006	—	The plaintiff filed a summons in chambers and two affidavits at about 2.45pm. The summons in chambers was an application under O 14 r 4 of the RHC, ie to use plaintiff's affidavit that was filed on the same day in support of the application in the originating summons. (Enclosure 24)	E
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[3] From the facts above, it can be seen that:

- (1) the plaintiff had filed six affidavits other than the one filed with the originating summons;
- (2) the first defendant had filed four affidavits; and
- (3) directions as to written submissions had been given and hearing date fixed.

[4] At the hearing on 27 January 2006 at 3pm, the plaintiff's counsel still insisted on a postponement of the hearing of the originating summons for three reasons:

- (1) that the summon in chambers filed on the same day should be heard first; and
- (2) the notice of appointment for the hearing of the originating summons issued under O 83 r 2 of the RHC in respect of the second defendant that had been

- A** filed on 4 January 2006 but had not been returned by the court registry to enable the counsel for the plaintiff to effect service on the second defendant; and
- (3) the court cannot make two orders for sale separately against both defendants.
- B** [5] I heard both the plaintiff's counsel and the first defendants' counsel after which I made the following order:
- (1) the plaintiff's application to file further affidavit was disallowed;
- (2) I postponed the hearing of the originating summons mainly on the belief that the notice of appointment in respect of the second defendant had not been extracted and therefore could not be duly served on the second defendant; and
- C** (3) a new hearing date was fixed, ie 28 April 2006 at 3pm.
- [6] I disallowed the plaintiff's application to file further affidavit on the following grounds:
- D** (1) a date for hearing, ie 27 January 2006 was fixed in the presence of a chambering student (Sri Hati) representing the plaintiff;
- (2) the fixing of the hearing date would indicate that parties had exhausted all their affidavit evidence; and
- E** (3) there must be an end to the filing of affidavit evidence.
- [7] In the case of *Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd* [2003] 4 MLJ 409, Mokhtar Sidin JCA said:
- F** It is to be noted that the proceedings of this application are by way of affidavit evidence. As such, in our view when the parties begin their submissions the evidence of affidavits is deemed to be closed and the parties are only allowed to submit on the evidence as found in the various affidavits.
- G** [8] The case cited is directly in point with the case before me. When the date of hearing was fixed, the chambering student representing plaintiff agreed to it and since the written submissions had already been filed (the plaintiff written submission having been filed on the 9 December 2005 and the first defendant on the 5 January 2006), 'the evidence of affidavits is deemed closed' and therefore there should be no more filing of affidavit evidence.
- H** [9] As such I think it is only correct that the further filing of affidavits be disallowed and put to a stop. Under the circumstances, I should have gone on to the hearing of the originating summons.
- I** [10] Though I disallowed the application in the summons in chambers filed on the 27 January 2006, I would also like to note here that the summons in chambers cited that it is made pursuant to O 41 r 4 of the RHC which reads as follows:

4 Use of defective affidavit (O 41 r 4)

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An affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

but upon reading the application it is not so, it is in fact an application to file two more further affidavits.

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[11] Even though I had disallowed further affidavits being filed, I had no choice but still to postpone the hearing of the originating summons not because the counsel for the plaintiff had requested for it but because the plaintiff counsel informed the court that the notice of appointment to hear the originating summons against the second defendant filed in court on the 4 January 2006 was not returned for it to be served on the second defendant.

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[12] I agree that the notice to hear the originating summons must be properly served, otherwise the proceedings or order made will be a nullity — *Muniandy all Thamba Kaundan & Anor v D & C Bank Bhd* [1996] 1 MLJ 374 where Edgar Joseph Jr FCJ said:

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In my view, the effect of failure on the part of the chargees to notify the chargors of the date of the adjourned hearing was of such fundamental importance as to render each and every one of the ex parte orders obtained, in consequence, a nullity.

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[13] Hence, the order to postpone the hearing of the originating summons. Ultimately, counsel for the plaintiff obtained her request to have the hearing postponed but for a different reason.

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[14] However, here too I must state that, subsequently upon checking the court file it was found that the notice of appointment in respect of the second defendant had in fact been processed by the court registry on the 19 January 2006 and returned to the plaintiff by placing the same in the plaintiff's Bar Council Box on the same day. The counsel for the plaintiff had sufficient time to serve the second defendant the notice of appointment and file the affidavit of service if efforts were made. This would have rendered the postponement of the hearing unnecessary. However, this is already water under the bridge.

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Plaintiff's application to file further affidavit dismissed with costs.

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Reported by K Krishnan

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